

STATE OF MICHIGAN
SUPREME COURT

ECHELON HOMES, LLC,

Plaintiff/Counter-Defendant/Appellant^{ee},

vs.

Court of Appeals No. 243112
Trial Court No. 01-029345CZ

CARTER LUMBER COMPANY,

Defendant/Counter-Plaintiff/Appellee^{ant}

and

ECHELON HOMES, L.L.LC,

Plaintiff-Counter Defendant/Appellant^{ee},

vs.

Court of Appeals No. 243180
Trial Court No. 01-029345 CZ

CARTER LUMBER COMPANY,

Defendant-Counter Plaintiff/Appellee^{ant}

Timothy O. McMahon (P48599)
Wasinger Kickham and Hanley
Attorney for Plaintiff/Appellant
26862 Woodward Avenue, Ste. 100
Royal Oak, MI 48067-0958
(248) 414-9900

Paul M. Stoychoff (P35906)
Russell & Stoychoff, P.C.
Attorney for Defendant/Appellee
2855 Coolidge, Ste. 218
Troy, MI 48084
(248) 816-9410

CARTER LUMBER COMPANY'S APPLICATION
FOR LEAVE TO APPEAL

NOTICE OF FILING

PROOF OF SERVICE

Paul M. Stoychoff (P35906)
RUSSELL & STOYCHOFF, P.C.
Attorneys for Carter Lumber
2855 Coolidge, Ste. 218
Troy, MI 48084
(248) 816-9410

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER ECHELON HOMES IS LIABLE FOR ITS AGENT'S FRAUD?

Defendant/Counter Plaintiff/Appellant says "Yes".

Plaintiff/Counter Defendant/Appellee says "No".

II. WHETHER ECHELON HOMES RATIFIED THE WRONGFUL CONDUCT OF ITS AGENT AND THEREFORE IS INDEBTED TO CARTER LUMBER IN THE AMOUNT OF \$26,987.82?

Defendant/Counter Plaintiff/Appellant says "Yes".

Plaintiff/Counter Defendant/Appellee says "No".

III. WHETHER THE TRIAL COURT ERRED IN GRANTING ECHELON HOMES' MOTION FOR SUMMARY DISPOSITION DISMISSING PLAINTIFF'S COUNTERCLAIM FOR ACCOUNT STATED SINCE A DISPUTED QUESTION OF AGENCY MUST BE LEFT TO THE JURY.

Defendant/Counter Plaintiff/Appellant says "Yes".

Plaintiff/Counter Defendant/Appellee says "No".

IV. WHETHER CARTER LUMBER DID NOT CONVERT ECHELON'S PROPERTY NOR AID AND ABET MRS. WOOD'S CONVERSION OF ECHELON'S PROPERTY?

Carter Lumber says "Yes".

Echelon Homes says "No".

V. WHETHER CARTER LUMBER DID NOT COMMIT FRAUD?

Carter Lumber says "Yes".

Echelon Homes says "No".

VI. WHETHER CARTER LUMBER IS NOT LIABLE FOR AIDING AND ABETTING
WOOD'S BREACHES OF FIDUCIARY DUTY?

Carter Lumber says "Yes".

Echelon Homes says "No".

STATEMENT OF PROCEEDING AND FACTS FOR BRIEF ON APPEAL

Defendant, Carter Lumber Company (hereafter “Carter”), is a lumber and hardware store located in White Lake, Michigan. Plaintiff, Echelon Homes, LLC (hereafter “Echelon”), was a very successful building company specializing in the construction of residential homes in Livingston County, Michigan.

Echelon employed Carmella Wood as their receptionist, secretary, bookkeeper and office manager. Unfortunately, the principals of Echelon, Carol Strange and James T. Hysen, failed to perform a criminal history check on Ms. Wood. If they had, they would have discovered that she had a past criminal conviction for embezzlement. Further, the principals of Echelon did not review Echelon’s monthly check transactions or checkbook statements and never had Echelon audited.

While employed at Echelon, Ms. Wood breached her position of trust and began stealing money from Echelon during 1997. The principals did not discover that she had been conducting a fraudulent scheme to take Echelon’s money until she went on vacation during the summer of 2000.

While she was away, Mr. Hysen began reviewing Echelon’s mail, bank statements and canceled checks. He discovered that Carmella Wood had forged the principals’ names to the corporate checks and purchased building supplies for herself and her husband using various corporate credit cards and credit accounts. In particular, Ms. Wood had forged Mr. Hysen;s name to a credit application for Carter Lumber. (Exhibit 1)

From approximately March 24, 1999 until February, 2000, Ms. Wood purchased supplies and materials, using Echelon’s credit account, from Carter Lumber in the amount of

approximately \$86,987.80. These purchases were made for the remodeling of the home where she and her husband, Michael Wood, resided. Also, Ms. Wood assisted her brother, Ronald Lobenstein, in purchasing material and supplies for his home and other projects on the Echelon account. After discovering Ms. Wood's criminal activity, Echelon reported these activities to the police and she was arrested. On January 29, 2001, she pled guilty to one count of embezzlement from Echelon Homes for over \$20,000.00, and four counts of uttering and publishing. (Exhibit 2) On March 12, 2001, the Court sentenced Ms. Wood to a prison term of 24 months to 10 years for the embezzlement and 24 months to 14 years for each of the uttering and publishing convictions. (Exhibit 3)

The Livingston County Circuit Court, shortly after the sentencing, conducted a restitution hearing. At the restitution hearing, Echelon admitted that it was indebted to various creditors as a result of Carmella Wood's actions in the amount of some \$600,000.00. In particular, Echelon admitted that it still owed Carter Lumber \$26,987.82. (Exhibit 4, which is from Echelon's Notebook of its creditors and debts, Exhibit 5 - James Hysen's deposition testimony, Exhibit 6 - the Restitution Hearing transcript, and Exhibit 7 - Carroll Strange's deposition testimony.)

In addition to going to the police and asking that criminal charges be brought against her, Echelon Homes brought a civil action against a beer and wine store that cashed some of the checks that Ms. Wood drafted; a lawsuit against the bank on which the checks were issued; an action against its Certified Public Accountant, claiming that he committed professional malpractice since he did not review the records and discover Ms. Wood's criminal and fraudulent activity; and a lawsuit against Carter Lumber.

In its Complaint against Carter Lumber, Echelon alleged in Count I that Carter Lumber aided and abetted in conversion since it unlawfully allowed Wood and her co-conspirators to charge tens of thousands of dollars on Echelon's account; Count II, aided and abetted the breach of fiduciary duties; Count III, Carter Lumber converted assets and properties of Echelon to its own use; and Count IV, Carter Lumber committed fraud in that it invoiced Echelon for goods and services which were not provided to Echelon and Carter knew that Echelon would pay the invoiced amount in reliance on the accuracy of the invoices.

In turn, Carter Lumber filed a counterclaim alleging breach of contract and account stated for the remaining amount of the balance due in Echelon's account of \$26,987.82 that Echelon admitted it owed (Exhibits 4, 5, 6 and 7) and filed a Motion for Summary Disposition.

After Ms. Wood was released from prison, Defendant took her deposition. Ms. Wood, at her deposition, stated: "No, they (meaning Carter) had no knowledge whatsoever. I scammed them just like I scammed my boss and my husband." Further, Ms. Wood stated that no kickbacks were given to any Carter employees. (Exhibit 8)

Further, Carroll A Strange, a principal for Echelon, was unable to articulate and set forth the evidence to demonstrate that Carter was intentionally involved in assisting Ms. Wood

Counterclaim for account stated. The Court stated:

“Well, in analyzing and looking at it, it does -- I’m going to be very candid. It just seems logical that the defendant’s request to dismiss the complaint should probably be granted. Primarily, the plaintiff has not provided the Court with any information to show that the defendant acted intentionally.” (March 27, 2002 hearing, page 7).

Carter filed a second Motion for Summary Disposition requesting that the Court enter a Judgment as to its counterclaim for account stated in the amount of \$26,987.82. In turn, Echelon Homes filed a Motion for Summary Disposition requesting that Carter Lumber’s counterclaim for account stated be dismissed since there was no issue of material fact.

The Trial Court, on July 10, 2002, conducted a hearing regarding both parties’ motions.

The Court, prior to rendering a decision, stated:

“Well, I mean Echelon made the mistake as it turns out of hiring this bookkeeper who ultimately pled guilty to the embezzlement. She falsified these pleadings and I don’t think anybody has disagreed about this. She was pretty darn clever. She falsified documents, she signed checks that she shouldn’t have. The documents that she falsified allowed people who were not given the authority from the owners of Echelon, I forget their names now. I forget their names, but the authorized people on the Echelon account with Carter Lumber were her at the end and then the two owners and somebody else; and she had somebody apparently, I’m looking at this in the light least favorable to her, but she had somebody go to Carter Lumber and pick up a load of stuff that Echelon had never ordered if she -- I keep wondering during all of this if she was doing extensive remodeling of her own house. . . But the bottom line is there isn’t a question of her malfeasance. On the other hand, Carter Lumber never --it appears from these pleadings that Carter Lumber never checked with the responsible owners at Echelon to determine if the bookkeeper had authority to do all this stuff.” (P. 4, July 10, 2002 Tr.)

In response, Carter stated that Echelon went before the Honorable Judge John Latrielle

in Livingston County Circuit Court at Ms. Wood's restitution hearing and admitted they owe \$26,987.82 to Carter Lumber. (P. 5, July 10, 2002 Tr.) Carter further argued:

"They (Echelon) owe the money, in their restitution hearing, said we owe the money, we owe the money to Carter Lumber; and I failed to include the transcript page from Mr. Hysen (sic), the other principal, and he also says --I reviewed his deposition this morning and it states Echelon Homes, I am sorry that's Echelon has an outstanding - - has an outstanding to Carter Lumber of \$26,987.82, correct? According to Carter Lumber's paperwork, apparently, yes that is the outstanding balance. So both principals acknowledge the debt. They do into circuit court in a restitution hearing, at Ms. Wood's restitution hearing and they claim that one of the debts that is owed to Carter Lumber from Echelon Homes is that amount." (pp. 5-6, Tr. July 10, 2002 and Exhibit 7).

The Court stated that the issue that it was concerned with was whether an account stated was created by the statements that Echelon made at the restitution hearing. (P. 13, July 10, 2002 Tr.) The Court then granted Echelon's Motion for Summary Disposition dismissing Plaintiff's Counterclaim and denied Carter Lumber's Motion for Summary Disposition requesting a judgment in its favor against Echelon Homes for \$26,987.82 based upon the fact that Carter Lumber did not admit any liability at the restitution hearing in the Livingston County Circuit Court. (P. 17, July 10, 2002 Tr.)

Carter objected to the Trial Court's ruling (P. 18, July 10, 2002 Tr.) Carter stated that an issue of material fact was created since Echelon did not file a counter affidavit with its answer to Carter's Counterclaim for Account Stated nor rebut Carter's prima facie counterclaim for account stated. (P. 18, July 10, 2002 Tr.) The Trial Court disagreed. (P. 18, July 10, 2002)

The Court did not address the argument contained in Carter Lumber's motion that Echelon Homes was vicariously liable for its agent's fraud or that Echelon Homes ratified the

wrongful conduct if its agent.

Carter Lumber appealed the Order entered by the Oakland County Circuit Court on July 22, 2002 (Exhibit 10) denying its Motion for Summary Disposition and granting Echelon Homes' Motion for Summary Disposition (Court of Appeals No. 243112).

Echelon Homes appealed the Order entered by the Oakland County Circuit Court on April 25, 2002 granting Carter's Motion for Summary Disposition (Exhibit 9) and dismissing its Complaint. (Court of Appeals No. 243180).

The Court of Appeals consolidated the above for review. On March 30, 2004, the Court of Appeals reversed the Trial Court's Order granting Carter's Motion for Summary Disposition and dismissing Echelon's Complaint. It also affirmed the Trial Court's Order granting Echelon's Motion for Summary Disposition dismissing Carter's Counterclaim. (Exhibit 11)

Carter now submits this Application for Leave to Appeal to this Honorable Court because the issues presented involved legal principles of major significance to this State's jurisprudence.

ARGUMENT

I. ECHELON IS LIABLE FOR ITS AGENTS'S FRAUD.

Echelon employed Carmella Wood as its agent, secretary, bookkeeper and office manager. The principals of Echelon placed her in this position to deal with the public. As a result, Echelon is bound by Ms. Wood's conduct since Echelon cloaked Ms. Wood with apparent authority to do acts that she was not authorized to perform.

The law concerning apparent authority is well established in Michigan. Apparent authority has been defined as:

“Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform on behalf of the principal, the particular act, and such particular act has been performed, the principal is estopped from denying the agent’s authority to perform it.” *Maryland Casualty Company v Moon*, 231 Mich 56; 203 NW2d 885 (1925).

Apparent authority for which a principal may be liable must be traceable to him or her and cannot be established by the acts and conducts of the agent. *LaPointe v Chevrette*, 264 Mich 482; 250 NW 272 (1933).

In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Smith v Saginaw Savings & Loan Ass’n*, 94 Mich App 263; 288 NW2d 613 (1979).

The vicarious liability of a principal for an agent’s intentional tort includes liability for fraud and other non-physical torts. *1 Restatement Agency 2d*, §219(2)(d), states the master is liable even if the servant is acting outside the scope of employment if the servant purports to act or to speak on behalf of the principal and there was reliance upon apparent authority if he was aided in accompanying the tort by the existence of the agency relationship. A principal who puts a servant or other agent in a position which enables an agent while apparently acting within his authority to commit a fraud upon a third party is subject to liability to such third person for fraud. *1 Restatement Agency 2d*, §201.

In *Central Wholesale Co. v Sefa*, 351 Mich 17; 87 NW2d 94 (1957), the court cited *Story on Agency* (9th Ed.) Sec. 443 which states:

“But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made

under his expressed or implied authority. It extends further, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or has held out to the public or to the other party, as having competent authority, although in fact, he has, in the particular instance, exceed or violated his instructions, and acted without authority. For, in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract, by holding out the agent as competent to act and as enjoying his confidence.

Persons dealing with an agent have the right to act upon the presumption that he is authorized to do and perform all things within the usual scope of his principal's business."

In the matter at hand, the court failed to follow the above precedent in rendering its decision. The court, in denying Carter Lumber's Motion for Summary Disposition and granting Echelon Homes' Motion for Summary Disposition, stated:

"Now the issue of account stated - - you know, by the way, I don't think anybody at Echelon, I don't think that the folks at Echelon and the folks at Carter Lumber came out smelling like roses in this. Echelon - - the Echelon owners relied clearly inappropriately on is it Carmella or Connie Wood, Carmella or Connie Wood in terms of their day to day activities; and I don't know whether this mitigates in favor of or against going on vacation.

Sometimes you would rather not know what's going on and if somebody's absence is going to make you find out, maybe that's not the best thing to do because it surely uncovered what can colloquially be described as a bag of worms, but the bottom line is **Echelon didn't have appropriate control in its shop of what jobs it had signed up for, where material was to go, how much, et cetera, et cetera, et cetera; and that is how this woman and her cohorts, if there were cohorts, was able to sidetrack a lot of material to her own home.**

On the other hand, Carter Lumber never checked beyond her and they did something that was clearly a bad business practice and that is extending credit to somebody from whom they had no authorization to extend credit to. This was an additional signer

on the fraudulent credit that she had already gotten. You must understand the reason I'm pointing this out is that nobody really did it right on either side of this lawsuit and both companies have been victimized.

The question is whether the summary judgment - - I think part of this falls on the accounts stated issue. I don't think even considering the additional testimony which you argue, Mr. Stoychoff, says this is not an account, but that's not an account stated. An account stated cannot be inferred from the response to the questions that were given at this hearing. I felt that when I read the part of the transcript that I did read and nothing that Mr. McMahon has read has caused me to change my mind, so there is no evidence of any express understanding between the principles at Carter Lumber and Echelon regarding the account and until the Echelon owners were on - - until Miss Wood went on vacation, Carter Lumber had no knowledge whatsoever of -- is she a bookkeeper or accountant?" (P. 13-15, July 10, 2002 Tr.) (Emphasis added.)

In reaching her decision, the court ignored all the un rebutted evidence that Carter Lumber presented to demonstrate that Carmella Wood was Echelon Homes' agent with apparent authority. As stated earlier, she was Echelon Homes' office manager. She opened the mail, she took all phone calls for Echelon Homes, she prepared all the checks for Mr. Strange and Mr. Hysen's signatures so that the bills would be paid.

Echelon Homes did not discover Ms. Wood's fraudulent scheme until she went on vacation. It was only when Mr. Hysen began performing the duties that he had delegated to Ms. Wood did he discover her fraudulent scheme.

As a result, Echelon must be held responsible for their lack of supervision of Ms. Wood. Echelon held her out to the public as its office manager in charge of the day to day operations of Echelon's office. If Echelon would have reviewed Ms. Wood's work, then it would have discovered her fraudulent scheme.

Therefore, the Court of Appeals erred in affirming the Trial Court's Order granting Echelon's Motion for Summary Disposition and dismissing Carter's Counterclaim and denying Carter's Motion for Summary Disposition entering a Judgment in the amount of \$26,987.82.

II. ECHELON HOMES RATIFIED THE WRONGFUL CONDUCT OF ITS AGENT AND THEREFORE IS INDEBTED TO CARTER LUMBER IN THE AMOUNT OF \$26,987.82.

The officers of Echelon, while testifying before the Livingston County Circuit Court at Carmella Woods' restitution hearing and at deposition, admitted that Echelon Homes had an outstanding balance to Carter Lumber for the above amount. Thus, the Court of Appeals erred in affirming the granting Echelon's Motion for Summary Disposition and denying Carter Lumber's Motion for Summary Disposition.

A principal's acceptance of the benefits of an agent's unauthorized acts generally ratifies such acts. The general rule is found at *Lomba v General Motors Corp.*, 303 Mich 556; 6 NW2d 890 (1992) in which the court stated:

"It is a proposition of law too fundamental and too well established to require a citation of authorities that, if a party adopts even unauthorized acts of another, and has received and accepted benefits accruing therefrom, he thereby adopts and ratifies the instruments by which the results were obtained, and is estopped from denying that the agent was authorized to act."

This general rule applies where the principal receives and accepts the fruits of the transaction even though the agent had made misrepresentations without the knowledge of the principal. *Lane v Wood*, 259 Mich 266; 242 NW 909 (1932).

In the matter at hand, Echelon is both liable for the remaining balance due since its officers ratified her conduct at the restitution hearing. As seen from their testimony, they

admitted that they were indebted to Carter Lumber for Ms. Woods' purchase.

Also, the construction supplies purchased at Carter Lumber and recovered by the Michigan State Police from Ms. Woods' home were given to Echelon. Echelon, in turn, used these goods to pay down its own debts. (Exhibit 5)

Thus, the Court of Appeals erred in affirming the Trial Court's Order granting Echelon Homes' Motion for Summary Disposition and denying Carter Lumber's Motion for Summary Disposition to enter a judgment in its favor in the amount of \$26,987.82.

III. THE TRIAL COURT ERRED IN GRANTING ECHELON HOMES' MOTION FOR SUMMARY DISPOSITION DISMISSING CARTER'S COUNTERCLAIM FOR ACCOUNT STATED SINCE A DISPUTED QUESTION OF AGENCY MUST BE LEFT TO THE JURY.

In the matter at hand, Carter Lumber filed a Counterclaim with the Trial Court for account stated so as to collect the balance owed resulting from Echelon's purchases. As part of its Complaint, it filed an Affidavit of Account pursuant to MCL 600.2145; MSA 25A.2145. Echelon did not file a counter affidavit as required by the above statute. MCL 600.2145; MSA 25A.2145 states in part:

"... if the defendant in any action gives notice, with his answer of a counter claim founded upon an open account, or upon an account stated, and annexes to such answer and notice a copy of such account, and an affidavit made by himself or someone in his behalf, showing the amount or balance claimed by the defendant upon such account, and that such account or balance is justly owing and due to the defendant, or that he is justly entitled to have such account, or said balance thereof, set off against the claim made by said plaintiff, and serves a copy of said account and affidavit, with a copy of such answer and notice, upon the plaintiff or his attorney, such affidavit shall be deemed prima facie evidence of such counter claim, and of the plaintiff's liability thereon, unless plaintiff, or someone in his behalf, within ten (10) days after service in causes in the circuit court and

before trial in other cases, makes an affidavit denying such account or some part thereof, and the plaintiff's indebtedness or liability thereon and serves a copy thereon upon the defendant or his attorney, and in case of a denial or part of such counterclaim, the defendant's affidavit shall be deemed to be prima facie evidence of such part of the counterclaim as is not denied by the plaintiff's affidavit . . ."

As a result, Carter's Verified Complaint for Account Stated created a prima facie case as a matter of law pursuant to the above statute and an issue of fact for the jury to determine.

Further, any disputed question of agency must be left to the jury since Echelon did not file a counter affidavit. The court in *Miskiewicz v Smolenski*, 249 Mich 63; 227 NW 789 (1929) held that:

"When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact for the jury to determine. Whether a given relationship is that of principal and agent, or anything else and the sufficiency of the evidence to show the existence of an agency, where reasonable minds differ, are questions of fact for the jury."

Likewise to be submitted to the jury are issues where there is conflicts in the evidence as to the scope of the agent's authority. *Pratt v Van Renssler*, 235 Mich 633; 209 NW 807 (1926).

In the matter at hand, as seen from the evidence presented to the Trial Court, not only did Ms. Woods act on Echelon's behalf as its agent cloaked in apparent authority, Echelon also ratified Ms. Woods' alleged unauthorized acts since they benefitted from the fruits of her illegal transaction when they recovered the property from the Michigan State Police. As a result, an issue of fact clearly exists. Thus, the Court of Appeals erred in affirming the Trial Court's Order granting Echelon's Motion for Summary Disposition dismissing Carter's Counterclaim.

IV. CARTER LUMBER DID NOT CONVERT ECHELON'S PROPERTY NOR AID AND ABET MRS. WOOD'S CONVERSION OF ECHELON'S PROPERTY.

Carter Lumber is an innocent party. Carter Lumber had no knowledge of Ms. Wood's criminal activity. As a result, the Trial Court did not error when it granted Carter Lumber's Motion for Summary Disposition pursuant to MCR 2.116(C)(10).

Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with, his rights therein. *Brennan v Edward D. Jones & Co*, 245 Mich App 156 (2001). Money is a subject of conversion only when it is cable of being identified, such as a specific coin. *Garras v Beklares*, 351 Mich 141; 23 NW2d 239 (1946). Also, checks are considered property of the designated payee and may be subject to a suit for conversion. *Trial Clinic, P.C. v Block*, 114 Mich App 700; 319 NW2d 639 (1982).

In the matter at hand, Ms. Wood, Echelon's former employee, stated that Carter did not participate in her scheme. **(Exhibit 8)** Further, Carter did not exercise any dominion or control over any of Echelon's personal property. The property that was taken was that of Carter's. Ms. Wood submitted a credit application with a forged signature of one of Echelon's principals upon it. Ms. Wood and her brother would then place an order for pick-up or delivery and purchase it with Echelon's credit account. Ms. Wood then used these supplies to remodel her home. Mr. Lobenstein used the supplies for remodeling his home and other construction projects he was involved in during this period.

As previously stated, Echelon employed Ms. Wood as its agent secretary, bookkeeper and office manager. Echelon placed her in this position to deal with the public. Some of Ms. Wood's duties were to open the mail, take all phone calls for Echelon and prepare all the checks

for signature for vendor payment. As a result, Echelon is bound by Ms. Wood's conduct since Echelon cloaked Ms. Wood with apparent authority to do acts that she was not authorized to perform.

The law concerning apparent authority is well established in Michigan. Apparent authority has been defined as:

“Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal, the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it.” *Maryland Casualty Company v Moon*, 231 Mich 56; 203 NW2d 885 (1925).

The vicarious liability of a principal for an agent's intentional tort includes liability for fraud and other non-physical torts. *1 Restatement Agency 2d*, §219(2)(d), states the master is liable even if the servant is acting outside the scope of employment if the servant purports to act or to speak on behalf of the principal and there was reliance upon apparent authority or if he was aided in accompanying the tort by the existence of the agency relationship. A principal who puts a servant or other agent in a position which enables an agent while apparently acting within his authority to commit fraud is subject to liability to such third person for fraud. *1 Restatement Agency 2d*, §201.

In *Central Wholesale Co. v Sefa*, 351 Mich 17; 87 NW2d 94 (1957), the court cited *Story on Agency* (9th Ed.) Sec. 443 which states:

“But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his expressed or implied authority. It extends further, and binds the principal in all cases where the agent is acting within

the scope of his usual employment, or has held out to the public or to the other party, as having competent authority, although in fact, he has, in the particular instance, exceed or violated his instructions, and acted without authority. **For, in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract, by holding out the agent as competent to act and as enjoying his confidence.**

Persons dealing with an agent have the right to act upon the presumption that he is authorized to do and perform all things within the usual scope of his principal's business." (Emphasis added.)

In this matter, Echelon Homes did not discover Ms. Wood's fraudulent scheme until she went on vacation. It was only when Mr. Hysen began performing the duties that he had delegated to Ms. Wood did he discover her fraudulent scheme.

As a result, Echelon must be held responsible for their lack of supervision of Ms. Wood, not Carter. Echelon held her out to the public as its office manager in charge of the day to day operations of Echelon's office. If Echelon would have reviewed Ms. Wood's work, then it would have discovered her fraudulent scheme long ago.

Thus, the Court of Appeals erred in reversing the Trial Court's Order granting Carter's Motion for Summary Disposition.

V. CARTER LUMBER DID NOT COMMIT FRAUD.

Carmella Wood testified that Carter had no knowledge of her fraudulent scheme. She stated that she lied to Carter so as to enable her to purchase the construction supplies.

The traditional common law claim of fraudulent misrepresentation requires the Plaintiff to show the following: 1) the Defendant made a material representation; 2) the representation was false; 3) the Defendant knew it was false when it was made or made it recklessly without

knowledge of its truth and as a positive assertion; 4) the representation was made with the intention to induce reliance by the Plaintiff; 5) the Plaintiff acted in reliance upon it; and 6) the Plaintiff suffered injury. *Temborious v Slayten*, 157 Mich App 387; 403 NW2d 821 (1986).

Michigan law requires a claim of fraud to be proved by clear, satisfactory and convincing evidence. *Hi-Way Motor Company v International Harvester Company*, 398 Mich 33; 247 NW2d 813 (1976).

In the matter at hand, Carter was an innocent party and, unfortunately, just as much a victim as Echelon. Ms. Wood testified:

Q. So, Seth had no knowledge of what you were doing?

A. None whatsoever.

Q. Did any employee at Carter Lumber have any knowledge of what was going on?

A. Not to my knowledge. I didn't - - -

Q. Did you give kickbacks to anybody?

A. Nothing . . . (**Exhibit 8**)

Thus, Carter did not make any material representations which it knew to be false and on which Echelon relied on to its detriment. As a result, the Court of Appeals erred in reversing the Trial Court's Order granting Carter's Motion for Summary Disposition.

VI. CARTER LUMBER IS NOT LIABLE FOR AIDING AND ABETTING WOOD'S BREACHES OF FIDUCIARY DUTY.

The cause of aiding and abetting breach of fiduciary duties does not exist in Michigan. Further, the allegations in Echelon's Complaint fail treated as civil conspiracy. The elements for civil conspiracy in Michigan are: 1) concerted action; 2) by a combination of two or more

persons; 3) to accomplish an unlawful purpose or a lawful purpose by criminal or unlawful means; and 4) causing damage to the Plaintiff. *Mays v Three Rivers Rubber Corp.*, 135 Mich App 42; 352 NW2d 339 (1984).

As seen from the above Statement of Facts, Carter did not aid and abet Ms. Wood in breaching her fiduciary duties and there as no concerted action between Carmella Wood and Carter to accomplish an unlawful purpose. Ms. Wood admitted that she had lied to Carter by submitting a forged credit application. At her deposition, Ms. Wood testified:

Q. Now, there was a credit application that was filled out to Carter Lumber?

A. Yes.

Q. Who did that?

A. I did.

Q. Whose name did you sign to that?

A. I believe its Jim's.

Q. Did they ask you to open an account with Carter Lumber?

A. I did a lot of accounts for them and they would sign them. This particular time, they weren't in the office, so I signed their name.

Q. But did they ask you to open up an account with Carter Lumber?

A. I told them that I was opening this account up because it was close to their subdivision over there by the proving grounds, but it never got used.

I did advise Jim and Kevin Cover, the foreman, that I had opened that up for them to use. They never used it and never went that far. I used it for my own personal use.

(Exhibit 8)

Ms. Wood also admitted that she lied to Carter's employees in order that they would execute the Waivers of Liens. Ms. Wood stated at her deposition:

Q. Okay. And those were the liens that - - the waivers that you had Seth sign, correct?

A. Correct.

Q. Now, explain to me how - - why how did you get Seth to sign those liens?

A. What it is, is the title company required a lien waiver stating either its paid in full or payment to be paid directly to the subcontractor or the vendor or supplier or whatever. And I needed him to give me one that I could get a check cut to him to Carter Lumber for a partial payment, which I did, and I took it down there to have him sign.

Q. Okay.

A. On my house.

Q. On your house?

A. Yes.

Q. Okay, but did he just sign it?

A. Yes.

Q. And you just stuck it in front of his face?

A. Yes.

Q. Did you explain to him that this is - -

A. Yes. I told him I needed it to get payment from the title company for that job. He thought it was, quote-unquote, a job.

Q. Oh. So it was his mistaken impression that he was signing off on a job, a legitimate job for Echelon Homes?

A. Yes, exactly.

Q. Okay. And there was two other waivers that were signed, I think?

A. Exact same thing.

Q. So- -

A. He was under the impression that it was a legitimate job for Echelon Homes.

Q. So you misrepresented to Seth what, in fact, was going on.

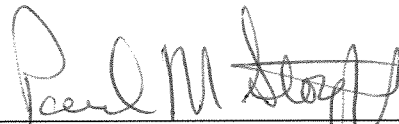
A. Right, I lied to him. **(Exhibit 8)**

As a result, the Trial court did not err in granting Carter Lumber's Motion for Summary Disposition and the Court of Appeals erred in reversing the Trial Court's Order granting Summary Disposition and dismissing Echelon's Complaint..

RELIEF REQUESTED

Wherefore, Carter Lumber Company requests Carter Lumber Company's Application for Leave to Appeal be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Paul M. Stoychoff", written over a horizontal line.

Paul M. Stoychoff (P35906)
Attorney for Defendant/Appellant

Dated: April 20, 2004